Supreme Court, U.S.
FILED
JAN 21 1994
OFFICE OF THE CLERK

(2)

No. 93-1005

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

THE HERTZ CORPORATION,

Petitioner,

-against-

THE CITY OF NEW YORK, *et al.*,

Respondents.

Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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January 21, 1994

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BEST AVAILABLE COPY

LIST OF PARTIES

Petitioner, the plaintiff-appellant below, is The Hertz Corporation.

Respondents, the defendants-appellees below, are (i) The City of New York, (ii) Paul A. Crotty, in his official capacity as Corporation Counsel of the City of New York, and (iii) Richard Schrader, in his official capacity as Acting Commissioner of Consumer Affairs of the City of New York.[1]

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[1]Messrs. Crotty and Schrader are substituted as parties automatically pursuant to Supreme Court Rule 35.3. They are the successors in office to O. Peter Sherwood and Mark Green, respectively. This substitution also applies to the petition for certiorari filed by the above-named parties, No. 93-841.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, the City of New York and two of its officials, respectfully pray that this Court deny the cross-petition for writ of certiorari seeking review of portions of the judgment of the United States Court of Appeals for the Second Circuit, entered on August 2, 1993.

STATEMENT OF THE CASE

Respondents rely on the Statement of the Case at pages 5-9 of their Petition for Writ of Certiorari, No. 93-841.

SUMMARY OF ARGUMENT

The Court of Appeals correctly ruled that, if the challenged ordinance is subject to section 1 of the Sherman Act, it is not illegal per se but is subject to review under the rule of reason. Per se illegality is applied only to economic restraints that experience has shown invariably violate section 1, such as horizontal price fixing. Hertz's claims notwithstanding, the challenged ordinance does not fix prices; it merely directs businesses not to use a car renter's residence as a basis for charging a different price, and it does not meet the stringent criteria for per se illegality.

The Court of Appeals was also correct in holding that noneconomic factors should be considered in any assessment of Int. No. 71-A under the rule of reason. Municipal legislation often responds to concerns broader than the purely economic interests that drive business decisions intended to enhance a business's competitive position. As the Court of Appeals explained, many such local legislative objectives also reflect important federal values, and any Sherman Act analysis of local legislation must recognize these interests as factors to be weighed when assessing an economic restraint under the rule of reason.

REASONS FOR DENYING THE CROSS-PETITION

I. There is no basis for finding that Int. No. 71-A imposes a restraint shown by experience to restrain trade unreasonably, hence the Court of Appeals was correct in determining that the ordinance is not illegal per se under the Sherman Act.

The Sherman Act is "intended to prohibit only unreasonable restraints of trade." *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723 (1988). Generally, the reasonableness of a particular restraint "is determined through case-by-case application of the so-called rule of reason" -- a fact-based assessment of the effects of the challenged practice. *Id.* However, where extensive experience has shown that a given restraint is invariably unreasonable, that practice is "conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases and becomes a per se violation." *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 8, 7-9 (1979).

Per se illegality is not favored. "[T]here is a presumption in favor of a rule-of-reason standard; . . . departure from that standard must be justified by demonstrable economic effect . . . ." *Business Electronics*, 485 U.S. at 726. Per se analysis is used only where the challenged practice "almost always tends to restrict competition and reduce output." *Id.* at 726-727; *see also, Broadcast Music*, 441 U.S. at 19-20. Since such a determination necessarily requires a thorough understanding of the actual economic impact of a particular practice, "[t]he *per se* rule is not employed until after considerable experience with the challenged restraint."

Broadcast Music, 441 U.S. at 19 n.33; *see also Quality Auto Body, Inc. v. Allstate Ins. Co.*, 660 F.2d 1195, 1203 (7th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982).

While Hertz cites cases for the undebatable proposition that horizontal price-fixing is illegal per se, Hertz cites nothing to support its contention that Int. No. 71-A is price-fixing legislation simply because it eliminates residence as a basis for setting different prices. *See* Cross-Petition for a Writ of Certiorari at 2-3. Hertz assumes that any restraint affecting price is a per se Sherman Act violation, but this Court has said that "[n]ot all arrangements among actual or potential competitors that have an impact on price are per se violations of the Sherman Act or even unreasonable restraints." *Broadcast Music*, 441 U.S. at 23; *see also Business Electronics*, 485 U.S. at 728 (per se analysis not compelled simply because the challenged practice could lead to higher prices) *and* at 733 (attaching significance to the fact that challenged restraint did not involve actual agreement setting prices).

The restraint at issue here -- prohibition against using a renter's residence as a basis for charging different rental rates -- is far from the direct establishment of price levels that has long been held to be a per se violation of the Sherman Act. Hertz has cited nothing to show that past experience has persuasively demonstrated that this kind of restraint diminishes competition at all, much less that it invariably has such an effect. Accordingly, the Court of Appeals was correct in holding that the criteria for per se illegality are not present here. This holding takes on added force in view of this Court's observation that per se analysis may be inappropriate when assessing municipal activities since conduct considered anticompetitive when done by a private party may be seen differently when done by a municipality. *See Hertz Corp. v. City of New York*, 1 F.3d

121, 129 (2d Cir. 1993) (citing *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 56 n.20 (1982)).

II. The Court of Appeals correctly decided that any rule-of-reason review of Int. No. 71-A could not be limited solely to the economic effects of the legislation.

New York City's petition for a writ of certiorari explains that an unfortunate consequence of the Court of Appeals' erroneous determination that Int. No 71-A is not unilateral action is the need for a trial balancing Hertz's claims about the economic effect of the ordinance against the City's more varied reasons for enacting it, thereby returning federal courts to the unlamented era when they passed on the reasonableness of state and local legislation. *See* Petition for Writ of Certiorari, No. 93-841, at 23-27. However, if Int. No. 71-A is to be scrutinized for reasonableness under section 1 of the Sherman Act, the review should include consideration of the full array of factors that led New York City to pass the legislation.

Hertz offers just two cases to support its contention that rule-of-reason analysis encompasses review of economic concerns only: *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978) and *National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984). *See* Cross-Petition for Writ of Certiorari at 3. However, neither case involves municipal legislation. No conflict with decisions in other circuits is claimed in the cross-petition nor does the Court of Appeals' ruling depart from any clear precedent of this Court.

As the Court of Appeals recognized, the criteria used to assess the reasonableness of business arrangements created by economic actors to maintain a market or enhance their profitability are simply inadequate when applied to municipal legislation, which is often intended to deal with problems such as public health and welfare, community divisiveness, and racial equity, considerations not readily quantifiable in a purely economic analysis. As the Court of Appeals explained, these values, like the system of spirited economic competition protected by the antitrust laws, are also important federal concerns, "embodied in the thirteenth and fourteenth amendments as well as in many of the federal statutes." *Hertz Corp.*, 1 F.3d at 131. Local legislative authority would be significantly curtailed if legislation motivated by noneconomic concerns could be thwarted solely on the basis of its economic impact, with no weight given to the health, safety, or social concerns that might have motivated the legislation. Hertz has not met a petitioner's burden of stating any persuasive reason for this Court to review the Court of Appeals' determination on this issue.

CONCLUSION

THE CROSS-PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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City of New York,
Attorney for Respondents.

LEONARD J. KOERNER,*
LAWRENCE S. KAHN,
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